DEPARTMENT OF STATE

BRIEFING MEMORANDUM 7900[illegible]

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JAN 2 [illegible]

TO: The Deputy Secretary

THROUGH: E - Mr. Richard N. Cooper

FROM: EB - Julius L. Katz

Interpretation and Implementation of Recent Legislation on Human Rights and Export Controls

My view of Congressional intent and the proper Administration response on this subject differs substantially from that set forth in the November 8 memorandum to you from HA, H and L (at Tab 1).

Scope of Countries Requiring Review

The principal point made in that memorandum is the view that the new amendment to Section 502B of the Foreign Assistance Act of 1961 was intended to require careful review of police exports to a fairly wide scope of countries. Without prejudging whether we might find it desirable to do this, I find nothing in either the legislation or the legislative history to support such a finding. Detailed comment is at Tab 2.

The legislation requires a validated license for export of crime control and detection instruments and equipment to all countries except NATO, Australia, New Zealand, and Japan. However, we can and should establish informal arrangements with Commerce so that, for most other countries, either we would not review applications or our review would be no more than pro forma.

DEPARTMENT OF STATE A/CDC/MR
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The November 8 memorandum states that police exports should be reviewed whether or not there is a serious question whether the recipient should be considered a gross and consistent violator. It would be desirable to review such exports if there were a serious question on this score. However, there is certainly no requirement for reviewing such exports in the absence of such a serious question nor is there any apparent justification for doing so.

Burden of Proof

The November 8 memorandum states:

> "the appropriate basis for reviewing proposed police exports is whether there is an adequate factual basis for defending the proposition that the country of destination is one whose government does not engage in a consistent pattern of gross violations. If the Executive Branch is unable to defend that proposition, then police exports to the country in question are prohibited unless a prior certification of extraordinary circumstances is made."

I concur with the concept of not requiring a formal finding of a pattern of gross violations as a precondition for review, because such a finding might trigger action under other legislation as well.

However, I see no reason to require reviews just because we may not have obtained factual evidence to demonstrate the absence of such a pattern. Indeed, it is doubtful whether we could ever obtain conclusive evidence on this point for any country, even conceptually.

Furthermore, there is a basis in other legislation for concluding that Congress intended the burden of proof to be on those maintaining that rights are being violated. Section 2(b)(1)(B) of the Export-Import Bank Act of 1945 as amended states:

> **"....Only in cases where the President determines that such action would be in the national interest where such action would clearly and importantly advance United States policy in such areas as international terrorism, nuclear proliferation, environmental protection and human rights, should the Export-Import Bank deny applications for credit for nonfinancial or noncommercial considerations."**

There is also no apparent reason to require a certification of extraordinary circumstances to permit exports in the absence of a prior determination of a consistent pattern of gross violations.

Commodity Coverage

The term "police exports," used in the November 8 memorandum, should not be construed to mean exports of a wide variety of non-munitions items to the police. Commerce controls required by the new legislation are limited to "crime control and detection instruments and equipment."

Commerce now also controls other items, such as computers. These other items were put under a validated license requirement for export to non-Communist countries for national security purposes. The objective was and is to prevent re-exports to the East. The controls on other items can and have also been used to further foreign policy objectives, such as in the human rights area. However, I am unaware of any basis for us to construe that Congress intended that we do this.

Attachments:

Tab 1 - Memorandum dated November 8
Tab 2 - Detailed Comments on Arguments in the November 8 Memorandum

Drafted by: EB/ITP/EWT/WARoot:tlw
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DEPARTMENT OF STATE

TAB 1

S/S

November 8, 1978

TO: The Deputy Secretary

FROM: HA - Patt Derian
E - Douglas J. Bennet, Jr.
L - Herbert J. Hansell

Human Rights Policy and Police Exports

The recently enacted International Security Assistance Act of 1978 has amended section 502B of the Foreign Assistance Act of 1961 (FAA) to establish a strict human rights standard for exports to foreign police and other law enforcement authorities. This new legislation prohibits "security assistance" to the police, or licensing by the Commerce Department of exports of crime control or detection equipment to any recipient,* where the country of destination is one whose government engages in a consistent pattern of gross human rights violations. This prohibition may be waived by the President if he certifies to the Congress before a license is issued that extraordinary circumstances warrant such assistance or licenses. In addition to the specific prohibition on exports to "gross violators," it appears that the new amendment was intended to require careful review of police exports to a fairly wide scope of countries considered to have serious human rights problems. The full text of the amended section 502B is attached.

1. Transactions Covered by the Amendment

The practical effect of the new legislation will be entirely on the licensing of commercial exports by the Departments of State and Commerce. These affected exports

*A separate provision in the 1978 legislation amends the Export Administration Act to require validated Commerce licenses for exports of such equipment to all countries except NATO members, Australia, Japan and New Zealand.

are referred to hereafter in this memorandum as "police exports."*

2. Substantive Legal Standards

As in previous human rights legislation, Congress has used a "consistent pattern of gross violations" standard, and has chosen not to spell out the precise meaning of that term. There is no indication that Congress intended in this context to require the formulation of a "hit list" of gross and consistent violators. Rather, in accordance with Executive Branch practice under other laws employing this standard, the appropriate basis for reviewing proposed police exports is whether there is an adequate factual basis for defending the proposition that the country of destination is one whose government does not engage in a consistent pattern of gross violations. If the Executive Branch is unable to defend that proposition, then police exports to the country in question are prohibited unless a prior certification of extraordinary circumstances is made.

The "extraordinary circumstances" criterion is substantively no different from that which would apply to police exports licensed by the Office of Munitions Control irrespective of this specific amendment to section 502B. The first sentence of section 502B(a)(2) prohibits all forms of security assistance to a gross and consistent violator "[e]xcept under circumstances specified in this section." The only reference to "circumstances" specified in section 502B is in subsection (c)(1)(C)(i), which requires a judgment by the Secretary of State that "extraordinary circumstances exist which necessitate a continuation of security assistance...."

What is added by the specific amendment on police exports, apart from the coverage of Commerce-controlled exports, is an emphasis on a type of export which, when made to a repressive government, is especially likely to be used in ways that reinforce and maintain repression. The special procedures prescribed by the new legislation

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*While section 502B(d)(2) defines security assistance broadly to include a number of programs under the FAA, and foreign military sales and financing (FMS), assistance to law enforcement agencies under the FAA is expressly prohibited and is not an authorized purpose for FMS.

indicate explicitly that police exports involve special risks of direct United States identification with human rights violations and, therefore, a stronger justification of extraordinary circumstances is required for such transactions.* Congress may be expected to scrutinize with great care Executive Branch judgments that police exports to human rights violators are justified by extraordinary circumstances. Each exception will require a persuasive explanation.

Implementing Procedures.

The requirement for a Presidential** certification of extraordinary circumstances seems intentionally designed to discourage frequent use of the exception. While a certification can be made without an express determination that the recipient consistently engages in gross violations, any certification of extraordinary circumstances would implicitly acknowledge that there are serious questions concerning the recipient's observance of human rights. According to section 654(c) of the FAA, each certification must be published in the Federal Register unless a further determination is made that publication would be harmful to the national security.***

Procedures have been developed whereby police export license applications are referred to HA by State's Office of Munitions Control and by Commerce's Office of Export Administration. HA will advise the concerned bureaus of cases where approval would appear to warrant a certification, or where human rights considerations otherwise warrant some action other than routine approval.

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*See H.Rep. No. 95-1141, p. 14.

** Under Executive Order 10973, the President's functions under part II of the FAA (where section 502B is located) are delegated to the Secretary of Defense, unless otherwise specified. An amendment to the Executive Order will be proposed to delegate the President's functions under section 502B(a)(2) to the Secretary of State.

***Determinations that publication of any findings or determinations under the FAA would be harmful to national security have been rare. None has been made during the present Administration.

Our review procedures are intended to be responsive not only to the minimum requirements of the law, but also to the reasonable political expectations of the Congress in enacting it. It is clear from the legislative history of this amendment that Congress was concerned generally with the human rights implications of police exports, and it seems implicit in the legislation that police exports to a fairly wide range of countries should be reviewed from a human rights standpoint, whether or not there is a serious question whether the recipient should be considered a gross and consistent violator. Moreover, review for a broad range of countries is necessary because the criteria prescribed by section 502B(a)(3) and (c)(1) for all forms of security assistance are already applicable as a matter of law to Munitions Control export licenses. Indeed, the amendment appears to reflect a judgment by Congress that these criteria ha not been applied rigorously enough in practice.

Finally, it should be noted that a recent enumeration of countries about which there is Congressional concern on human rights grounds is contained in the House Appropriations Committee's report on the FY 1979 foreign assistance appropriation bill.* According to that report, the following countries, some of which are current recipients of police exports, are of particular concern: Afghanistan, Argentina, Bangladesh, Bolovia, Cameroon, Chad, Dominican Republic, El Salvador, Ethiopia, Ghana, Guatemala, Haiti, Indonesia, Iran, Mali, Morocco, Nepal, Nicaragua, Panama, Paraguay, Philippines, South Korea, Sudan, Thailand, Tunisia, Uruguay, Yemen and Zaire.

In the event of irreconcilable disagreements among bureaus as to the appropriate disposition of proposed police exports, the issues will be referred to you for decision.

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*H.R. Rep. No. 95-1250, p. 9

cc: T - Mrs. Benson
E - Mr. Cooper
PM - Mr. Gelb
S/P - Mr. Lake
EB - Mr. Katz

L:JHMichel:HA:SCohen:edk:11/2/78
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ATTACHMENT 7

"SEC. 502B. HUMAN RIGHTS.--(a)(1) The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States promote and encourage increased respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

(2) Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights. Security assistance may not be provided to the police, domestic intelligence, or similar law enforcement forces of a country, and licenses may not be issued under the Export Administration Act of 1969 for the export of crime control and detection instruments and equipment to a country, the government of which engages in a consistent pattern of gross violations of internationally recognized human rights unless the President certifies in writing to the Speaker of the House of Representatives and the Chairman of the Senate Foreign Relations Committee, that extraordinary circumstances exist warranting provision of such assistance and issuance of such licenses. Assistance may not be provided under chapter 5 of this part to a country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights unless the President certifies in writing to the Speaker of the House of Representatives and the Chairman of the Committee on Foreign Relations of the Senate that extraordinary circumstances exist warranting provision of such assistance.

(3) In furtherance of paragraphs (1) and (2), the President is directed to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States, through such programs, with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States as expressed in this section or otherwise.

(b) The Secretary of State shall transmit to the Congress as part of the presentation materials for security assistance programs proposed for each fiscal year, a full and complete report, prepared with the assistance of the Coordinator for Human Rights and Humanitarian Affairs, with respect to practices regarding the observance of and respect for internationally recognized human rights in each country proposed as a recipient of security assistance. In determining whether a government

falls within the provisions of subsection (a)(3) and in the preparation of any report or statement required under this section, consideration shall be given to --

(1) the relevant findings of appropriate international organizations, including nongovernmental organizations, such as the International Committee of the Red Cross; and

(2) the extent of cooperation by such government in permitting an unimpeded investigation by any such organization of alleged violations of internationally recognized human rights.

(c)(1) Upon the request of the Senate or the House of Representatives by resolution of either such House, or upon the request of the Committee on Foreign Relations of the Senate or the Committee on International Relations of the House of Representatives, the Secretary of State shall, within thirty days after receipt of such request, transmit to both such committees a statement, prepared with the assistance of the Coordinator for Human Rights and Humanitarian Affairs, with respect to the country designated in such request, setting forth—

(A) all the available information about observance of and respect for human rights and fundamental freedom in that country, and a detailed description of practices by the recipient government with respect thereto;

(B) the steps the United States has taken to—

(i) promote respect for and observance of human rights in that country and discourage any practices which are inimical to internationally recognized human rights, and

(ii) publicly or privately call attention to, and disassociate the United States and any security assistance provided for such country from, such practices;

(C) whether, in the opinion of the Secretary of State, notwithstanding any such practice—

(i) extraordinary circumstances exist which necessitate a continuation of security assistance for such country, and, if so, a description of such circumstances and the extent to which such assistance should be continued (subject to such conditions as Congress may impose under this section), and

(ii) on all the facts it is in the national interest of the United States to provide such assistance; and

(D) such other information as such committee or such House may request.

(2)(A) A resolution of request under paragraph (1) of this subsection shall be considered in the Senate in accordance with the provisions of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976.***

(B) The term "certification", as used in section 601 of such Act, means, for the purposes of this subsection, a resolution of request of the Senate under paragraph (1) of this subsection.

(3) In the event a statement with respect to a country is requested pursuant to paragraph (1) of this subsection but is not transmitted in accordance therewith within thirty days after receipt of such request, no security assistance shall be delivered to such country except as may thereafter be specifically authorized by law from such country unless and until such statement is transmitted.

(4)(A) In the event a statement with respect to a country is transmitted under paragraph (1) of this subsection, the Congress may at any time thereafter adopt a joint resolution terminating, restricting, or continuing security assistance for such country. In the event such a joint resolution is adopted, such assistance shall be so terminated, so restricted, or so continued, as the case may be.

(B) Any such resolution shall be considered in the Senate in accordance with the provisions of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976.

(C) The term "certification", as used in section 601 of such Act, means, for the purposes of this paragraph, a statement transmitted under paragraph (1) of this subsection.

(d) For the purposes of this section—

(1) the term "gross violations of internationally recognized human rights" includes torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, and other flagrant denial of the right to life, liberty, or the security of person; and

(2) the term "security assistance" means—

(A) assistance under chapter 2 (military assistance) or chapter 4 (economic support fund) or chapter 5 (military education and training) or chapter 6 (peacekeeping operations) of this part or part VI (assistance to the Middle East) of this Act;

(B) sales of defense articles or services, extensions of credits (including participations in credits [sic]), and guaranties of loans under the Arms Export Control Act; or

(C) any license in effect with respect to the export of defense articles or defense services to or for the armed forces, police, intelligence, or other internal security forces of a foreign country under section 38 of the Arms Export Control Act.[sic]

Slot items

TAB 2

Detailed Comments on Arguments in the November 8 Memorandum from HA, H and L to the Effect that Section 502B of the Foreign Assistance Act of 1961, as Amended, Requires Careful Review of Police Exports to a Fairly Wide Scope of Countries

1. The November 8 memorandum states:

> "....review for a broad range of countries is necessary because the criteria prescribed by section 502B(a)(3) and (c)(1) for all forms of security assistance are already applicable as a matter of law to Munitions Control export licenses."

Section 502B(c)(1) becomes applicable only if there is a specific Congressional request for a statement from the Department.

Section 502B(a)(3) refers to general criteria of promoting and advancing human rights and avoidance of identification of the United States with governments which deny to their people internationally recognized human rights and fundamental freedoms. These criteria might be construed as less rigorous than the test set forth in Section 502B(a)(2) (consistent pattern of gross violations of internationally recognized human rights). However, paragraph (a)(3) is "in furtherance of paragraphs (1) and (2)," not just (2). Paragraph (1), which calls for the United States to promote and encourage increased respect for human rights, is not specifically oriented to export controls, whereas paragraph (2) is. Accordingly, it would be reasonable to assume that the specific criterion in paragraph (2) is intended to modify the general criteria in paragraph (3) for purposes of reviewing proposed exports.

Even if the general criteria in paragraph (3) were judged not to be modified by the more specific criterion in paragraph (2) for export control purposes, paragraph (3) applies only to international security assistance

programs and thus has no bearing on criteria for the review of Commerce export control cases.

2. The November 8 memorandum states:

> "....a recent enumeration of countries about which there is Congressional concern on human rights grounds is contained in (HR Rep. No. 95-1250, p. 9)"

The operative language in this report is as follows:

> "The Committee has received testimony, information, and expressions of concern from Members and public witnesses about alleged human rights violations in the following countries:...."

The list certainly cannot be regarded as countries which the Congress considered should not be receiving police exports. The report did not conclude that these countries are engaged in a consistent pattern of gross violations of internationally recognized human rights.

The Congress did not even associate itself with the "expressions of concern from Members and public witnesses." Accordingly, it does not follow that even careful review would be required in all these instances.

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